

THE IMPOSSIBILITY OF LUJAN'S PROJECT

GENE R. NICHOL*

Coming, as I do, from just down the road in Chapel Hill, I feel I should begin by congratulating my Duke colleagues on your basketball season. I should do that, I know. Actually, I do feel that if Carolina can't finish first in the ACC—in the spirit of Triangle fellowship—then I am glad Duke has. But in my hometown they tell me that I only feel that way because I haven't been in North Carolina very long.

And I am certainly honored to have been asked to give the keynote address at this impressive forum. You have brought in great lawyers and academics and activists from around the country. I see that I have been allotted about three or four hours to speak. I did do a brief ill-fated political stint once—but I am not Fidel Castro. This is almost enough time for a Bill Clinton State of the Union Address. Unless something goes very badly astray, I think I can promise that we will be done “way early” as my daughter says.

I am also delighted to have an actual substantive topic to address. I have been a law school dean now for almost all of the past dozen years; and deans are not usually entrusted with substantive topics. We are usually just brought in to introduce the people who have substantive thoughts to convey. And in my second term at Colorado, I discovered I was only brought in to introduce the people who would introduce the people who had substantive thoughts to convey.¹

So I am glad to have a real, substantive topic, even if it is standing, and even if it means talking about *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*² If, after a few minutes, I start asking you for money, don't worry. It's just habit.

* Dean, University of North Carolina-Chapel Hill School of Law

1. I didn't realize at first that giving warm and mindless remarks—meant to stir the hearts and avoid offending some group of wealthy alumni—was so large a part of a dean's job. The only thing I found more alarming than that was that after I'd been doing it for a while, my colleagues started saying, “You know, you're really good at making warm and mindless remarks—you're a natural at it.”

2. 528 U.S. 167 (2000).

As I looked at the program this afternoon, I saw that I am speaking about “Access to the Judicial System, Citizen Suits, and the Structure of Standing.” I have no doubt that somewhere, in the dark recesses of time, I agreed to that description. I probably even suggested it. But, close up, it sounds particularly dreadful. So, today, I think I’d put it a little differently.

We are here to discuss *Lujan v. Defenders of Wildlife*³ and *Laidlaw*—and more broadly—the future of environmental citizen suits and shared public actions. Cases in which a plaintiff, in some fashion or other, asserts the public’s interest rather than just his own—in an attempt to challenge the actions of the government or a private party.

That future, of course, had seemed modestly secure—at least for statutory grants of standing—until a few years ago, when Justice Scalia talked his colleagues into following his lead in *Lujan*. There, without apparent embarrassment, the Justices concluded that “legislatively pronounced” “public rights” cannot provide the basis for standing in the federal courts unless they comport with the Justices’ views of discrete, concrete and tangible injury.

Put another way, Justice Scalia and his colleagues announced that a bolstered, toughened, more manly, injury requirement would be applied to limit both statutory and constitutional private attorney general suits. For the first time in modern Article III analysis, the court ruled that even though a federal statute sought to bestow standing on a broad category of plaintiffs, the attempted grant of jurisdiction violated the strictures of the case or controversy requirement. A clear statutory expression of authority to “any person” fell before the notoriously amorphous demand for a constitutional case.

Given that, and given the essential similarity between the Endangered Species Act claim invalidated in *Lujan* and reams of other environmental and consumer-oriented claims, for eight years one of the largest questions in public standing law has been, “what’s next?” *Laidlaw* attempts to say with some conviction that the answer to the “what’s next” question is: “not as much as you might think.” And many (me among them) are tempted to respond, “Thank God for small favors—or even large ones.”

I want to suggest that *Laidlaw* is right in its essential answer—the answer that we will not dramatically re-make public law in the United States through the unlikely tool of the standing doctrine. *Laidlaw* is right on that front. And that should not have come as a great surprise

3. 504 U.S. 555 (1992).

to us. Even if we might have been surprised that the vote to reverse our friends on the Fourth Circuit was 7-2. It perhaps should not have been a surprise, not just because of changes in Court personnel or theories of Article III, though those might have played a role.

Laidlaw should not have been a surprise because Justice Scalia's project in *Lujan*—no matter how committed he may be to it, or how persuasive he can be with his colleagues—Scalia's project in *Lujan* is essentially impossible. Or it's at least much closer to impossible than folks have typically thought. And if something is close to impossible, it's not very likely to happen. *Laidlaw* announced, for now, and I think for a good long time, that it will not happen. Why it's impossible is what I want to dwell on this afternoon.

But if I am going to talk about why *Lujan's* project is impossible, I owe it to you to try to describe what I think *Lujan's* project is. So I will start with that. It's not a great secret. Justice Scalia laid it out fairly clearly even before he became a Supreme Court Justice in a now-famous 1983 Suffolk University Law Review article.⁴ There he wrote that the standing doctrine should be invigorated to combat the "overjudicialization of the processes of self-governance."⁵ A tougher "distinct and palpable" harm standard should be employed not only to abolish generalized constitutional claims but also to dramatically limit the power of Congress to grant standing.

A heightened injury rule would "restrict[] courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and exclude[] [courts] from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of *the majority itself*."⁶ Statutory rights, Scalia wrote, do not necessarily "suffice to mark out a subgroup of the body politic requiring judicial protection."⁷ Claims based on the public interest—the shared interests that we hold in common—are political disputes, not lawsuits. Congress has no power to change that, even if it has been rather blatantly doing so for decades.

That sentiment, of course, began to look like law in *Lujan*. The rights asserted under the Endangered Species Act were described as

4. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

5. *Id.* at 881.

6. *Id.* at 894.

7. *Id.* at 865-96.

an inappropriate basis for jurisdiction because they were “abstract,”⁸ “noninstrumental,”⁹ and “plainly undifferentiated and common to all members of the public.”¹⁰ And even if the generalized grievance notion had only been applied in constitutionally-based cases in the past, “there is”, the Court wrote, “absolutely no basis for making the Article III inquiry turn on the source of the asserted right.”¹¹ For those who were paying attention, that seemed to suggest that it made “absolutely” no difference that Congress had passed a law giving plaintiffs standing to assert the “abstract and undifferentiated” rights in question.

The Court’s vision of injury, not the Congress’s, marks the boundaries of Article III. Were the Justices to ignore the “distinct and palpable harm” standard at the invitation of the Congress, they would violate Article III as clearly as if they heard a fender bender in which there is no diversity jurisdiction. At least implicitly, *Lujan* also suggested that what was good for the Endangered Species Act¹² in this case might be good for the Clean Air Act,¹³ the Clean Water Act,¹⁴ the Surface Mining Act,¹⁵ the National Environmental Policy Act,¹⁶ the Fair Housing Act,¹⁷ and the like, in others cases yet to come. Distinct, palpable, individuated injury is necessary for a federal lawsuit, regardless of what the Congress might have had in mind.

So *Lujan*, in full flower, would strike at congressionally authorized standing and the claimed “overjudicialization” of the operation of American government. It would restrict the permissible range of statutory standing to concrete, individualized injuries that “mark out a subgroup of the body politic requiring judicial protection.”¹⁸ The goal of that heightened standard would be to remove the federal courts from the determination of citizen suits based on shared, common concerns, which are actually designed to serve the “interests of the majority.” Otherwise, as Justice Scalia eventually wrote in dissent

8. *Lujan*, 504 U.S. at 601.

9. *Id.*

10. *Id.* at 575.

11. *Id.* at 576.

12. 16 U.S.C. § 1540(g) (1994).

13. Air Pollution Prevention and Control (Clean Air) Act, 42 U.S.C. § 7604(a) (1994).

14. Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1251 (1994 & Supp. IV 1998).

15. Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1994).

16. 42 U.S.C. § 4321 (1994).

17. 42 U.S.C. § 3601 (1994).

18. See Scalia, *supra* note 4, at 895-96.

in *Laidlaw*, we “place the immense power of suing to enforce the public laws in private hands.”¹⁹

MOVING AWAY FROM THE PROJECT

Now, of course, *Laidlaw* was not the first post-*Lujan* case to suggest that this unflinching injury regime, even in statutory cases, might not be all that it was cracked up to be. We can choose our own examples, I suppose. But two years ago in *Federal Election Commission v. Akins*,²⁰ the Supreme Court extended standing to a plaintiff claiming to be “aggrieved” under the federal election laws because of the “failure to obtain relevant information” about a political action committee.²¹

This made the case sound a good bit like one of the Supreme Court’s famous “no generalized grievance” cases on the constitutional side—*United States v. Richardson*.²² *Richardson* held that a citizen’s group could not sue to obtain information about the CIA’s budget—though the Accounts Clause of the Constitution seemed to guarantee it—because the plaintiffs’ interest in the information was “undifferentiated”—the same as everyone else’s.²³ Justice Scalia, perhaps predictably, saw *Richardson* and *Akins* as two peas in a single jurisdictional pod.

But the Court said that *Richardson* was irrelevant in the *Akins* case because there was a “statute [involved] which . . . does seek to protect individuals. . . from the kind of harm they say they have suffered. . . .”²⁴ *Lujan*’s foundational point that there is “absolutely no basis” for distinguishing between generalized constitutional and statutory claims was rejected flatly. Since Justice Breyer wrote the opinion for the Court, it was rejected with some enthusiasm. At least this part of *Akins* ought to be welcome. Because if, as the Court has been saying now for decades, the standing doctrine is “built on the single basic idea” of separation of powers, it surely is not “absolutely” irrelevant whether the Court is acting to validate an Act of Congress or invalidate one.

But if *Akins* turned its gaze away from *Lujan*, *Laidlaw* sped up the process. Not only did the majority in *Laidlaw* refuse to export

19. See 528 U.S. at 215 (Scalia, J., dissenting).

20. 524 U.S. 11 (1998).

21. See *id.* at 17.

22. 418 U.S. 166 (1974).

23. See *id.* at 177.

24. See *Akins*, 524 U.S. at 21.

toughened injury standards to the mootness arena; it applied very generous notions of injury—seeking to ease access—and remarkably flexible concepts of redressability—in order to lower the thresholds of Article III.

And, more important for my purposes, Justice Ginsburg read the requirements for a case and controversy so as to validate, in her words, the “legislature’s range of choice.”²⁵ That “range” of congressional discretion included a commitment to civil penalties in citizen suits. Rather than degrading or discarding the remedial decisions of the Congress, the majority considered itself bound by them. *Laidlaw* stretched jurisdiction to defer to legislative power. *Lujan* manipulated jurisdiction to wage war against it.

But these descriptions of *Akins* and *Laidlaw* only suggest majority opinions with shifting priorities. Change in priority is likely the most consistent theme in all of standing law. Liberal courts give way to conservative ones. Interventionist courts become passive. Judges often bend jurisdictional principles to hear the cases they want to hear, and contract them to rid themselves of disputes they disdain. If *Laidlaw* and *Akins* represent more than that, if they represent a rejection of *Lujan*’s effort to circumscribe statutory citizen suits by using the judicially defined concept of injury, why would that be so?

ILLEGITIMACY

The first, and I suppose the best reason for rejecting *Lujan*, as I and others have written, is that it is illegitimate. *Lujan*, it should be recalled, despite all the talk of judicial restraint, essentially invalidated an Act of Congress because it conflicted with the requirement of “distinct and palpable injury.” But the personal harm standard appears nowhere in the text of the Constitution. Article III refers to “cases” and “controversies.” And for over 30 years scholars have beaten home the point that injury was not a requisite for judicial authority—for the existence of a ‘case’—in either the colonial, framing, or early constitutional periods.

Louis Jaffe, Raoul Berger, Justice John Harlan, and more recently, Steve Winter, Evan Caminker and Cass Sunstein have demonstrated that “early English and American practices give no support to the view” that Article III demands injury.²⁶ I realize that Professor

25. See 528 U.S. at 187.

26. See, e.g., LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 462-467 (1965); Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 837-840 (1969); Evan Caminker, *The Constitutionality of Qui*

Clanton may have begun to weigh in a bit on the other side.²⁷ But it remains clear that the injury rule in *Lujan*, used to invalidate an Act of Congress, is supported neither by the text of the Constitution nor ascertainable in documented historical patterns and practice. It is past ironic, therefore, that Justice Scalia has written so forcefully on so many different occasions, that “a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule at all.”²⁸ I assume that sentiment should be said to apply even to Scalia-created standards.

But I have said *Lujan*'s work is impossible. And a constitutional rule does not become impossible merely because it is illegitimate. The Supreme Court's path breaking free exercise rule, announced in *Employment Division of Oregon v. Smith*,²⁹ may be illegitimate—given the history and intentions of the religion clauses. I am not sure. But it's clearly not an impossible rule to maintain. Quite the contrary. It is perfectly stable and predictable: except for discrimination claims, simply read the free exercise clause out of the Constitution. Judges could apply it with complete accuracy in their sleep.

But *Lujan*'s constitutional injury rule has problems well beyond its pedigree. If taken seriously, it would require the wholesale revision of vital and well-established areas of jurisdictional law. It also seeks to employ an infinitely malleable, largely circular, value-laden concept as a firewall against assertions of legislative power. That effort eventually leads the Court to appear inconsistent, hypocritical, and, on occasion, silly. *Lujan* sets forth a path, therefore, that most members of the Court are apparently unwilling to tread.

To explain.

First, the Court's toughened injury requirement is powerfully out of step with Article III's other settled standards—mootness and ripeness. Since the mid-1970s, the Supreme Court has clearly constitutionalized the injury, causation and redressability triad of the standing doctrine. The Court has also said, with clarity, that the mootness and ripeness standards stem from Article III.

Tam Actions, 99 YALE L.J. 341, 345 (1989); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, 'Injuries', and Article III*, 91 MICH. L. REV. 163, 177 (1992); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

27. See Bradley S. Clanton, *Standing and the English Prerogative Writ: The Original Understanding*, 63 BROOK. L. REV. 1001 (1997).

28. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989).

29. 494 U.S. 872 (1990).

But these jurisdictional cousins are more, the *Laidlaw* majority noted, than “standing set in a time frame.”³⁰ They arise from different worlds. They serve markedly different goals. Ripeness openly balances issues of caution with the need for review. It is hopelessly bound to the subject matter in dispute rather than any overarching, transcendent concept of harm. Ripeness varies, quite intentionally, with the nature of the claim on the merits. Remind yourself, to demonstrate the point, how much more difficult it is to present a ripe takings claim than a ripe free speech challenge.

And the mootness doctrine is defined most accurately by its myriad exceptions: the “voluntary cessation” exemption, the “capable of repetition” exemption, the “collateral consequences” rule, and the Court’s frequently generous treatment of class actions. In mootness, even the Chief Justice would completely suspend the requirement in cases that have been rendered stale after being accepted for review by the Supreme Court. Mootness looks for loopholes and stretches to fit disputes within them. The doctrine is more interested in keeping you in than fencing you out.

In short, the mootness and ripeness standards operate from rather wholeheartedly different perspectives than the standing doctrine. The presumptions slide in the opposite directions. The rules, such as they are, are based on practical imperative. The barriers call for specific factual applications rather than overarching guideposts. Obviously, if the persistence of distinct and palpable harm is all that really matters something has to give.

One of the most appealing aspects of the *Laidlaw* decision is that it looked these distinctions squarely in the eye and said, “no, something doesn’t have to give.” The Fourth Circuit was wrong to “conflate[]” standing and mootness—exporting the rigors of the individual injury determination to a purportedly mooted claim.³¹ All of jurisdictional law need not shift to accommodate *Lujan*—particularly areas like mootness and ripeness that work far better, and make far better sense, than the standing doctrine does.

PUBLIC LAW

Second, a bolstered injury requirement is at odds with the nature of public law. This, of course, is very old news. As Abe Chayes taught over two decades ago, while the traditional private rights liti-

30. See *Laidlaw*, 528 U.S. at 189-90.

31. See *id.* at 174.

gation model was bi-polar, retrospective, party-controlled and self-contained; public law litigation takes on a different cast. It typically vindicates constitutional or statutory interests rather than common law claims. The relief sought might affect many people and diverse concerns. The argument is often about whether and how a government policy should be carried out. The decree is usually designed to alter future behavior rather than to pay for past wrongs. The liability determination and remedial ruling are, to some extent, predictions of what is likely to happen in the future.

These realities, of course, put the bolstered injury regime into context. Individualized harm, stringent rules of causation and, most particularly, the demand for near-certain redressability seek to strike clearly at the reach of public law. But nothing in the Constitution prohibits a public litigation model, and maybe more relevant, the public law horse is clearly a long way out of the jurisdictional barn. *Flast v. Cohen*,³² *Reynolds v. Sims*,³³ *Shaw v. Reno*,³⁴ *Trafficante v. Metropolitan Life Insurance Co.*,³⁵ *Akins*,³⁶ *TVA v. Hill*,³⁷ *Northeastern Florida Chapter of the Associated General Contractors v. City of Jacksonville*,³⁸ are an array of such overbreadth cases. The more seriously *Lujan* is taken, the more radical the purge of modern jurisdictional law that it requires. Except for a couple of members of the Court, the Justices don't seem to have the stomach for it.

INJURY

But the biggest reason *Lujan* can't work has to do with the injury standard itself. It's not enough simply to inquire whether a plaintiff is injured in fact—concretely, tangibly, in a particularized fashion. We give credence to a plaintiff's concern for the snail darter, his interest in separationism, his worry over the indignity of being forced into irregularly shaped congressional districts, his apprehension that he might drive by a public park displaying a Christmas creche, and his desire for the generalized benefits of interracial association. We not only conclude that these are, somehow, concrete rights but we also

32. 392 U.S. 83 (1968).

33. 377 U.S. 533 (1964).

34. 509 U.S. 630 (1993).

35. 409 U.S. 205 (1972).

36. 524 U.S. 11 (1998).

37. 437 U.S. 153 (1978).

38. 508 U.S. 656 (1993).

necessarily decide, that they are, in each instance, interests that are judicially cognizable—that is, worthy of judicial protection.

The Justices would not, I assume, reach the same conclusion about a proffered desire to assure segregation or to remain in the country undetected as an illegal alien. Surely much of the basis for the denial of jurisdiction in cases like *Rizzo v. Goode*,³⁹ *O'Shea v. Littleton*,⁴⁰ and *City of Los Angeles v. Lyons*,⁴¹ was the Court's belief that the plaintiffs would be injured in the future only if they, again, ran afoul of law. A likelihood the Justices were not anxious to embrace. It is not possible to ask, "is there injury?" without asking, as well "injury to what?"

Of course this is a lesson every parent knows. I came back from a trip to Dallas a couple of weeks ago and brought my middle daughter a model horse that she'd been wanting for months and couldn't find in Chapel Hill. (The horse selection is apparently richer in Texas, like everything else. Or it's at least tackier, like everything else.) Given the difficulties of the travel schedule, I ended up not finding what my other two daughters wanted, so, by their lights, I came home empty handed. They, of course, explained with great fervor, that what I had done was "not fair"—their favorite words, having somehow been born with an innate sense of the 14th amendment. I had "hurt" them, they insisted. I responded, of course, that buying their sister something did them no harm—I simply failed to confer upon them the same benefit. Their asserted injury was one I was adamant not to recognize.

The fact that I lost this discussion with my daughters—and lost it badly—doesn't change the reality that injury is not a self-defining, factual construct. Justice Scalia's seeming belief that it is, is no more correct than was Justice Douglas's futile hope in *Association of Data Processing Service Organizations, Inc. v. Camp*⁴² that all standing issues would be made easy by the new reference marker "injury in fact." Injury is a malleable, value-laden concept. It is also impossible to segregate from the necessary inquiry exploring which of an inexhaustible array of interests is worthy of judicial protection.

Well, you may say, "so what?" "No legal rule is perfect and completely free from manipulation." It asks too much of a court to demand otherwise.

39. 423 U.S. 362 (1976).

40. 414 U.S. 488 (1974).

41. 461 U.S. 95 (1983).

42. 397 U.S. 150 (1970)

Well said. But a circular, value-ridden rule is particularly problematic to employ as a wedge against congressional grants of standing. First, it places the Supreme Court in the immensely undesirable position of saying that the Congress may believe a particular interest to be a public value—an appropriate basis for standing—but we disagree. Capping a public value—to use Joseph Vining's exquisite term—sounds dramatically like a legislative function, or, at the very least, a job for which the Congress is far better suited than the court.⁴³

Second, the injury barrier simply doesn't work well in the face of undeniable, and essentially unalterable, congressional power. Congress creates legal interests. It does so every day it's in session, and probably even when it's not. Creating legal interests is, in fact, what the Congress does for a living. And when those legally created interests, having been brought into existence, are allegedly transgressed, federal courts are immensely hard-pressed to deny that the injury standard is met.

Now I say, hard-pressed. That doesn't mean it's impossible, of course. *Lujan* itself made the attempt—though Justice Scalia's opinion presents a remarkable slalom. He argues that prior statutory standing cases, in which the plaintiffs asserted rights that would not have provided the basis for standing without the statute—cases like *Trafficante* and *Havens Realty Co. v. Coleman*⁴⁴—those cases merely recognized “de facto” injuries that were not previously judicially cognizable. Accordingly, their acceptance as a basis for jurisdiction did no violence to the injury standard.

Of course the assumption here is that there exists a universe of “de facto” injuries that constitutes the outer boundary of federal jurisdiction. So long as Congress chooses from among the pool, Article III is not transgressed. But it's hard to outline—without more—what this glossary of “de facto” injuries might be. Justice Scalia, I am sure, knows it when he sees it. But that doesn't mean anyone else does.

Trafficante's recognized interest in the “benefits of interracial association” apparently constituted “de facto” injury, but not “injury in fact.” It is, of course, interesting to speculate on the differences between “de facto” injury and “injury in fact”—beyond the reality that one phrase is in English and the other isn't. But I am not sure it gets us very far in understanding what is supposed to be a straightforward, threshold jurisdictional requirement in the federal courts. The dis-

43. See generally JOSEPH VINING, *LEGAL IDENTITY* (1978).

44. 455 U.S. 363 (1982).

tion is clearly not something on which one would want to build a constitution.

In a similar vein, Justice Scalia has explained that the reapportionment cases are not “generalized grievances” because “one voter suffers the deprivation of his franchise, and another hers.” While the right to the receipt of information he rejects as beyond injury in *Richardson* and *Akins* is “undifferentiated”—apparently incapable of being described as “one reader’s right to information, and another hers.” This has led the Justices further to debate whether “generalized grievances” are simply “widely shared” or must be “both abstract and widely shared.” Imagine Justice Scalia’s reaction if any other member of the Court sought to produce and describe such a set of distinctions. The fur would fly. Talk about injury on the head of a pin.

Of course, even if one gets past this dizzying discussion of harm, the Congress has other arrows in its quiver to confound the injury barrier. Legislators may explicitly define concepts of injury, causation and redressability. *Akins* suggests that “rights” to informational compliance can be added. If they are violated, of course, standing exists. The *qui tam* tradition would seem to indicate that the addition of a bounty to citizen-suit provisions would bring public actions rather squarely within the core of the injury standard. All of this demonstrates the likelihood that an insistent Congress could turn the vaunted injury standard into no more than a sophisticated drafting requirement.

Finally, two decades of injury jurisprudence has proven beyond doubt that an aggressive harm standard repeatedly takes the standing inquiry into arenas in which it simply has no business. If *Laidlaw* itself had gone the other way, the Court of Appeals was prepared to order, in effect, quite complex mini-trials to determine actual harm to downstream water users. Trials which are apt to be largely unrelated to the claim on the merits—that is, whether *Laidlaw* was violating its discharge permits under the Clean Water Act. Even if there is some correlation in *Laidlaw* between the case on the merits and the required injury trial, in reams of other standing cases—*Warth v. Seldin*,⁴⁵ *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,⁴⁶ *Allen v. Wright*, and *Lujan* itself—there is no relationship between the two inquiries whatsoever.

45. 422 U.S. 490 (1975).

46. 438 U.S. 59 (1978).

The dissenters in *Laidlaw* also showed no compunction about interfering with the congressional embrace of civil penalties as an alternative to injunctions. Though surely Article III is not meant to pose such a barrier to Congress' remedial choices in regulating interstate commerce.

The opinion in *Lujan* went on at great length about the dangers to executive prerogative and core Article II interests if jurisdiction were upheld. But it's hard to believe that all those dangers would have somehow disappeared if the plaintiff had purchased a plane ticket and was actually prepared to fly to Egypt to enjoy the company of the Nile crocodile.

Akins revealed, unsurprisingly, that tough implementation of the redressability standard could block the reviewability of much agency action, since we often don't know, as a final matter, how agency discretion will be exercised if the case is remanded. If agency discretion is ultimately employed against the preferences of the plaintiffs, can we say that the injury has been redressed?

The redressability standard has also raised interesting questions in equal protection cases, where the remedy may be to send the legislature back to the drawing board. After all, if lawmakers are barred from treating men and women differently in determining the drinking age, they may still choose to deny 18-year-old males the right to buy a beer. But surely it is nonsensical to take the Article III hurdle that far. And the Court has vacillated wildly in asking whether injury is satisfied by the denial of opportunity—as in cases like *Regents of the University of California v. Bakke*,⁴⁷ *Heckler v. Matthews*⁴⁸, and *North-eastern Contractors*—or whether the constitution demands the delivery of the actual goods—as in cases like *Warth v. Seldin* and *Allen v. Wright*. Again, this allows the Article III tail to wag the equal protection dog.

All of these concerns suggest to me that the Court in *Lujan* bit off more than it can comfortably afford to chew. *Laidlaw* and *Akins* likely reveal that *Lujan* will never live up to its author's aspirations. That doesn't mean, exactly, that it is a lark. Standing cases are frequently intuitive. The *Lujan* dispute not only involved the procedural applications of the Endangered Species Act (ESA)—a statute that, as the repository of spotted owl and snail darter lore, many Americans already regard as extreme—but turned on the implementation of the

47. 438 U.S. 265 (1978).

48. 465 U.S. 728 (1984).

ESA to projects in Africa and Sri Lanka. If ever a case was designed to bring on a judicial drop kick—*Lujan* was it.

That doesn't mean, though, that *Lujan* will actually have life in the garden-variety statutory public actions to which its language and its theories could so easily be applied. *Laidlaw* and *Akins* teach, I think, that *Lujan* will not manage to gut, or to significantly restrict, statutory standing in citizen suits. That is not apt to happen next year, or in 10 years or 20 years to come. That may be bad news for *Lujan*, but it's good news for American public law.